IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1127 of 1986

with

CROSS OBJECTION No 157 of 1999

with

FIRST APPEAL No 1129 of 1986

with

CROSS OBJECTION No.158 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA and

MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NEW INDIA ASSURANCE COMPANY LIMITED

Versus

CHANDANBEN RAJIBHAI SOLANKI

Appearance:

1. First Appeal No. 1127 of 1986
MR RAJNI H MEHTA for Petitioner
NOTICE SERVED for Respondent No. 1 to 4
MR ARUN H MEHTA for Respondent No. 5

2. CROSS OBJECTIONNo 157 of 1999
MR RAJNI H MEHTA for Petitioner
NOTICE SERVED for Respondent No. 1 to 4
MR ARUN H MEHTA for Respondent No. 5

CORAM : MR.JUSTICE D.C.SRIVASTAVA and
MR.JUSTICE H.K.RATHOD
Date of decision: 02/02/2000

ORAL JUDGEMENT (per D.C.Srivastava, J)

These 4 cases involving common questions of law and fact are proposed to be disposed of by a common judgement.

2. Matador No.GTK 4711 used for transport business was being driven by the owner cum driver respondent no.1 On 21.3.83 while this vehicle was being driven by the respondent no.1, three passengers alongwith their luggage were being carried in the said vehicle. They were Raijibhai Jethabhai Solanki, Fatesing Dhulsing and Somabhai Punjabhai Padhiar. It was alleged that the matador was being driven rashly and negligently with excessive speed and the vehicle was not under the control of the respondent no.1 On Padra-Jambusar Road near Village Mahuvad, a buffalo suddenly appeared on the road. The driver respondent no.1 could not control the matador and dashed with the buffalo, as a result of which the matador turned turtle on the road. Out of the three passengers, Raijibhai Jethabhai Solanki and Fatesing Dhulsing died on the spot and third passenger Somabhai Punjabhai Padhiar sustained injuries. The buffalo also died in the accident. It was alleged that Somabhai Punjabhai Padhiar sustained serious injuries. As such four claim petitions No.869/83, 113/84, 787/84 and 950/83 were filed.

3. The claim petitions were resisted by the driver-cum-owner as well as by the appellant who was the opposite party no.2 before the Tribunal on the ground that the driver was not driving the matador rashly and negligently. It was also denied that the third occupant passenger sustained any injury in the accident. The accident is not disputed. It is also not disputed that two passengers travelling in the matador with their goods

died on account of the injuries sustained.

4. The Tribunal after considering the evidence adduced by the parties awarded compensation of Rs.7200/in MACT Case No. 869/83, Rs.85600/- in MACT Case No. 950/83, Rs.86500/- in MACT No. 113/84 and Rs.3000/- in MACT No. 786/84. No appeal was preferred against the award rendered in MACT Case No. 787/84. This was for causing death of the buffalo in the accident. The appeal was preferred against the award in MACT Case No. 869/83 but it was subsequently withdrawn. As such only these two appeals No. 1127 and 1129 both of 1986 are pending which are under consideration. These two appeals arose out of MACT Cases No. 950/83 and 113/84.

5. Shri Arun.H.Mehta appeared on behalf of the respondent no.5 owner-cum-driver Mahendrabhai Manibhai Patel. None appeared from the side of the claimants the respondents no.1 to 4. Previously Shri M.S.Shah was appearing on their behalf but consequent upon his elevation to the Bench of this Court, notice was issued to the claimants but they did not engage any other Counsel nor they are present.

6. The claimants have filed two cross objections in which two prayers are relevant, one is that the Tribunal ought to have awarded further amount of compensation atleast to the tune of Rs.15000/- and the other is that the interest at the rate of 6% p.a. was also erroneously awarded by the Tribunal.

7. The cross objections can be dismissed for two reasons, firstly that nobody is present to press these cross objections, secondly even on merits there is nothing in the cross objections to suggest as to how the compensation worked out by the Tribunal in these two motor accident claims Tribunal cases out of which these two appeals arose is less nor it is explained how and for what reasons a further sum of Rs.15000/- should have been awarded by the Tribunal towards compensation. Likewise on the claim of interest no cogent ground is given that the interest awarded is less. Further since nobody is present to press these cross objections, they are liable to be dismissed and are hereby dismissed with no order as to costs.

8. Coming to the two appeals, Shri RH Mehta, learned Counsel for the appellants had not challenged the findings of the Tribunal that the accident took place on account of rash and negligent driving of the matador by its owner-cum-driver. The Tribunal has correctly

recorded the finding based on evidence that the speeding matador dashed with the buffalo passing on the road and the matador turned turtle and was lying on the road. It further found that the driver was not driving the vehicle at a controllable speed; rather he was driving the vehicle at an excessive speed in a rash and negligent manner. The Tribunal further observed and held that if the driver would have taken proper care and caution while driving his vehicle, the accident could have been avoided. We do not find any reason to interfere with these findings of the Tribunal, more particularly when these findings are not challenged by the Learned Counsel for the appellant.

9. Shri R.H.Mehta, Learned Counsel, for the appellant however assailed the finding of the Tribunal regarding liability of the appellant New India Assurance Co. Ltd. for payment of any compensation awarded by the Tribunal. In support of his contention he firstly relied upon the terms and conditions in the insurance policy issued by the appellant. One of the limitations as to the use of the matador vehicle having carrying capacity of 3 tonnes was that the policy does not cover use of carrying passengers in the vehicle except employees other than the driver not exceeding six in number coming under the purview of the Workmen Compensation Act, 1993. He was right in his submissions that if one of the terms and conditions of the policy was that carriage of passenger in the matador was prohibited and the Insurance Company did not undertake the liability for any injury or death caused to any passenger travelling in such goods vehicle the Tribunal could not have awarded any compensation against the appellant. The submission seems to be correct. He has also relied upon a verdict of the Apex Court in Smt.Mallawa's Vs. Oriental Insurance Company and Others in JT 1998 SC 217. In this case, the Apex Court has laid down the test as to how it is to be determined whether a passenger was carried for hire or reward in the goods vehicle. It laid down that the correct test to determine whether the passenger was carried for hire or reward would be whether there is a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. It would not be possible to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions of tha vehicle for carrying passengers for hire or reward. Thus, the real test for determination whether the passenger was carried for hire or reward in a goods vehicle should be that such passengers should be carried for hire or reward not once

or on stray occasions but generally as well as regularly. In the case before us, there is no evidence that the matador in question was carrying passengers frequently, generally and regularly for hire & reward. From the Insurance Policy it is clear that it was a goods vehicle having capacity of 3 tonnes and it was to be used as Public Carrier under the permit within the meaning of Motor Vehicles Act. There is clear finding of the Tribunal that the matador was being used for transport business. Transport includes transport of passengers as well as goods. There is no evidence that this vehicle was used only or also for transport of passengers. On the other hand the evidence is that it was used for transport of goods only.

10. The Tribunal found from the statement of the cleaner-cum-conductor of the vehicle that two passengers had given him Rs.5/- each as transport charges and the other two passengers had given Rs.4/- each as transport charges. It is not clarified whether the transport charges were for carriage of goods or for passengers or for both. Moreover, two passengers died and the third sustained injuries but there is no explanation or evidence as to what happened to the fourth passenger. Even if Rs.5/- each were charged from two passengers and Rs.4/- each from two other passengers, it can be said that these passengers were carried for hire or reward only on one occasion and not frequently. Consequently carriage of passengers on one occasion will not be enough for holding that the passengers were regularly carried, in matador, for hire or reward.

11. The driver cum owner has denied that any fare or freight was charged from four passengers. The Tribunal has however drawn the presumption that it should be presumed that the amount of transport charges was paid to the cleaner-cum-conductor on behalf of the driver-cum-owner of the matador and as such the passengers were not gratutious passengers. This reasoning cannot be sustained in view of the Apex Court's verdict in Smt.Mallawa's case (Supra) where it was held that even if passengers were carried for hire or reward only once or on stray occasions it cannot be said that such passengers were generally carried for hire or reward. The reasoning of the Tribunal that because of payment of fare these three persons cannot be said to be unauthorised persons travelling in the matador can be no ground to fasten the liability on the appellant, more particularly when the terms of the Insurance policy and the ambit of law propounded by the Apex Court in Smt.Mallawa's case are otherwise. We are further of the

view that the Tribunal has wrongly drawn presumption that there was implied authority of the owner to allow the passengers to travel with the goods in the matador. No such permission or authority in the absence of any evidence direct or circumstantial could be drawn by the Tribunal. There is also no force in the reasoning of the Tribunal that there is no evidence to show that the driver or cleaner of the matador were prohibited from permitting the passengers to travel with their goods in the matador. It seems that the policy was not looked into by the Tribunal. Since the terms of the policy prohibited carrying passengers in the vehicle, no further prohibition was required to be established by the appellant company.

12. For the reasons stated above, we are of the opinion that the Tribunal was in obvious error in awarding compensation against the appellant. However, in the absence of any appeal from the side of the owner-cum-driver the award against the respondent no.5 owner cum driver does not require any interference.

13. In the result, F.A.No. 1127/86 and 1129/86 are allowed. The impugned awards dated 6.3.1986 against the appellant are set aside. However, the award against the owner-cum-driver is maintained. The cross objections filed by the claimants are dismissed. In the circumstances of the case, parties shall bear their own costs in this Court.

14. Shri R.H.Mehta informed that the insurance Company appellant has deposited the compensation, interest and costs in the Tribunal and a portion thereof has been paid to the claimants. Consequently, as a result of allowing the two appeals, it is herby directed that the remaining amount of compensation, interest and costs deposited by the appellant and lying unpaid so far shall be refunded to the appellant.

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